

# CONSTRUCTION law

NEWS AND ADVICE FROM BIRKETT LONG

## JCT 2016 building contract changes

Peter Allen outlines the key changes in this new suite of documents

## Planning permission and copyright

Who owns the drawings upon which the planning permission is based? Stephen Avila explains.

## Practical protection before you enter a contract

Straightforward guidance that will provide reassurance and help avoid potential litigation.

Without the correct construction law advice you might not have the right foundations for your building project.

Birkett Long's specialist team will help guide you through contentious and non-contentious construction issues. Our broad range of legal services includes drafting contracts, project support, dispute avoidance, adjudication, litigation and more. You will have the assurance that comes from working with a specialist and highly ranked construction law team that is based in Essex, but works throughout the country, and even internationally.

# JCT 2016

## building contract changes

The 2016 JCT building contracts have been released over the past few months, and the updated Standard Building Contract suite was released on 22 September 2016. This suite has replaced the 2011 Standard Building Contracts and all subsequent amendments. In this article, Peter Allen explores the key changes that have been made and, in practical terms, what the changes mean.

### Articles

There are three principal changes to the Articles in the 2016 suite. These are:

1. Article 5 replaces “CDM Co-ordinator” with “Principal Designer”, bringing the terminology in line with the Construction Design and Management Regulations 2015
2. Article 6 deletes the reference to the Site Waste Management Plans Regulations 2008, as these Regulations were revoked in 2013
3. Article 8 refers to the updated version of the Construction Industry Model Arbitration Rules (CIMAR)

In practice, these amendments really just serve to bring terminology and references in line with current legislation and will have no impact on the effect of the contracts.

### Contract particulars

The 2016 contract particulars are no longer in two parts. Previously under the 2011 contracts, part two dealt with third party rights and collateral warranties. This has been deleted under the 2016 suite of contracts, leaving it for the parties to produce a separate document detailing what rights are to be granted to additional parties. There is provision at section 7 in the main body of the contract particulars to append a separate document of this nature, intended to allow the parties greater flexibility.

“The JCT has now launched updated versions of all its forms of contract and these should be used rather than the 2011 versions.”

Most changes refer to the payment conditions under the 2016 contracts. Whilst these are the most widespread, the amendments are largely stylistic, relating to approach rather than to altering the substance significantly.

The main changes to payment conditions are:

Selling or purchasing land with planning permission has many advantages. As there are no intellectual property rights in the planning permission itself, anyone can use it because the permission belongs to the land – not to the party that obtained it.

## Planning permission

### and copyright

You must of course ensure that you comply with the planning conditions that were granted with the permission. Generally, this is done by reference to drawings and usually a condition will be that development is carried out in accordance with those drawings. It is also commonplace for all applications and associated drawings to be posted online by the planning authority with a facility available to the public to download them. However, it is generally made clear

that any drawings are subject to copyright and their use limited to specific purposes, or in the event they are not, the drawings often bear their own copyright notice. Even without notices, copyright subsists in the drawings and they cannot be reproduced or copied without the owner’s permission.

In a previous article we discussed the importance of obtaining early advice to ensure that you have the right to use drawings - either



# Law Update

## Hot on the heels of the JCT 2016...

...comes the NEC4.

Published in June 2017, these replace the popular NEC3 suite of contracts. There are unlikely to be dramatic changes, as these are more of a development of the NEC3, but there will be a design and build option, and it is anticipated that assessments will be final and binding at the end of a development.

A report on the major changes will be featured in our next newsletter.

Keep up to date via our website [www.birkettlong.co.uk/construction](http://www.birkettlong.co.uk/construction)

We are happy to help with any questions you may have. If you need advice, give Peter Allen a call on 01245 453813.

1. Monthly interim valuation dates apply throughout the construction period and the rectification period
2. The employer must promptly assess (within 28 days) claims for loss and expense
3. A bespoke fluctuation or cost adjustment formula can be used, replacing fluctuation options B and C
4. The period of time between the due date and the final date for payment with interim and final applications differed under the 2011 suite; this has now been standardised as 14 days for both

The inclusion of fair payment clauses are intended to make the suite more appealing to public bodies.

### Building Information Modelling (BIM)

BIM is the use of digital modelling in the construction industry to assist in the design and build of projects. The ability to be able to digitally plan a build assists in the projection of costs from a much earlier stage. The Government mandated that all public sector construction projects must use BIM by 2016. The inclusion of BIM in the new suite of JCT contracts - as with the fair payment clauses - makes them more appealing to public bodies.

### Definitions

Throughout the 2016 edition, changes have been made to defined terms and certain terminology has been replaced, largely to bring it in line with changes in legislation. This is unlikely to have much of an impact in practical terms.

### Summary

The suite of contracts is now more concise and user friendly. The amendments are likely to make them more appealing to the public sector.



by way of an assignment of the rights or by obtaining a licence to use them - and to get a formal agreement drawn up. If you do not do this, even if you think you have covered yourself by instructing your own architects to prepare new drawings for amendment to the existing planning permission or otherwise, you should be very careful as you could have infringed copyright in the originals.

In the recent case of Signature Realty Ltd v Fortis Developments Ltd and another, the court found that the architect's copyright was infringed as the property developer who obtained planning permission was not the developer who built the building. The claimant had planning permission to build student accommodation on the basis of his architect's drawings, but he was unable to secure finance to buy the

site. The site was subsequently sold to the defendants, who engaged their own architect.

However, they were found to have infringed the drawings prepared by the claimant's architect by using them for purposes other than those specified on the planning portal and in breach of the owner's subsisting rights. Although the court refused to grant an injunction, it ordered an enquiry as to what damages (if any) the claimant had suffered.

This case highlights the tricky line developers must tread when purchasing land with planning permission if they are to avoid infringing copyright. If you have any questions related to planning permission or other intellectual property issues, please contact Stephen.



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When entering into a contract parties often get so involved in negotiating terms that they fail to consider who the other party is and what they are worth. Let's say you are offered a £1 million contract on which you believe you can make a large profit. That promised profit could blind you to the necessary and practical steps you should take to protect yourself.

## practical protection

### before you enter a contract

The first point is to make sure you know who you are contracting with. Is it an individual, a partnership, an LLP or a limited liability company? If it is a limited liability company, is it one in a group and is it the one you want to be contracting with? If the other party is overseas, that could cause you difficulties: if something goes wrong how do you sue them, where do you sue them and how can you enforce any judgment?

You also need to know whether the company is worth anything. For companies in England and Wales this can be done quite simply. There are a number of credit reference agencies who will provide a report or you can simply carry out a search yourself at Companies House free of charge. You can see the latest filings by a company, including their last accounts, which will give an indication of the company's value and liquidity.

Of course, if the company is not worth anything you can take steps to protect yourself. You might choose not to proceed with the contract. Or you might ask for a parent company guarantee, personal guarantees, an advance payment or a payment bond.

You have to be wary of people who split their businesses between the trading entity and the holding company. The holding company holds the assets whilst the trading company incurs the liability. If the trading company cannot pay, you will be unable to

take action against assets held within the holding company.

For some people, the evidence of insurance feels like sufficient protection. But is it? You need to consider what the terms of the insurance may be. Does it cover all possible risks? Is the level of insurance at an appropriate limit? What is the insurance excess? All these factors should be considered as cover that is disproportionate to the contract being entered into will mean your potential losses are not covered. You can, of course, request a copy of the insurance policy before you sign on the dotted line.

A view of the policy has the added advantage of allowing you to inform insurers of any possible claims. Doing this will prevent an insurer refusing to indemnify the insured because of late notification of potential claims - the most common reason for insurers failing to pay.

Another reason for viewing the policy is to ensure that terms of the insurance are complied with. These may relate to the way in which works are to be undertaken or the safety steps that are required. If you know of these conditions then you can insist they are complied with at the time the works are carried out.

These are very simple, effective and free steps that you can take to protect yourself. Knowing who you are contracting with and understanding their worth will give you reassurance when you enter into a contract.

For more advice, please contact Peter Allen on 01245 453813 or email [peter.allen@birkettlong.co.uk](mailto:peter.allen@birkettlong.co.uk)

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